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No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JAMES BLAKE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a suspect initiated discussions with police within the meaning of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), where, after the suspect invoked his right to counsel, police interrogated him by disparaging his decision to consult counsel, where the only remedial action taken was a statement by one officer to another officer, and where the trial court found as a matter of fact that the suspect's statement was made in response to unlawful police interrogation.

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STATEMENT OF THE CASE

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created a rule designed to preserve the integrity of a suspect's choice to deal with police through counsel: when a suspect requests counsel, all interrogation must cease unless the suspect reinitiates communication voluntarily and without prompting. In the present case, the Maryland Court of Appeals upheld the trial court's grant of respondent's motion to suppress by applying the straightforward *Edwards* rule to the facts before it: a suspect unequivocally requested counsel, was later illegally interrogated, and spoke to officers shortly afterward in response to that illegal interrogation. Having conceded that Mr. Blake was illegally interrogated, Petitioner nevertheless challenges the Court of Appeals' reasonable application of *Edwards* by completely ignoring the factual findings of the Maryland trial court and by proposing a gaping exception to the *Edwards* rule that would allow police to challenge a suspect's request for counsel with impunity so long as they punctuated their remarks with a reminder that the suspect retained the rights that the police just violated. Petitioner's attempt to relitigate the facts and to undermine *Edwards* should be rejected, and the judgment of the Maryland Court of Appeals should be affirmed.

1. In the early morning hours of October 26, officers of the Annapolis, Maryland police department obtained a warrant for Mr. Blake's arrest; the warrant was issued at 2:04 AM. JA 337-38. Shortly afterward, at 2:46 AM, the court that approved the warrant generated a statement of the charges against Mr. Blake, which included both the charges against Mr. Blake and the purported maximum possible penalty.[1] See *id.* at 329, 333. The first charge on the first page of the document was first degree murder of Straughan Griffin. See *id.* at 329. In all capital letters, the statement of

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[1] Maryland Rule 4-212(e) requires police to provide a copy of this statement "promptly" after arrest.

charges claimed that Mr. Blake faced a penalty of "DEATH" for this offense. See *id.* This claim was patently false – as a juvenile, Mr. Blake was statutorily ineligible for the death penalty in Maryland. See *id.*; see also Md. Code Ann., Crim. Law § 2-202(b)(2)(i). The police were well aware that Mr. Blake was a juvenile; the birth date on the very same page of the statement of charges indicated that Mr. Blake had recently turned seventeen. See JA 329; see also *id.* at 30.

Later on the morning of October 26, at around 4:30 AM, a dozen police officers arrested Mr. Blake at his home. See JA 173. Mr. Blake was sitting on his couch watching cartoons on television when a team of police entered with guns drawn. See *id.* at 174-75. The police ordered Mr. Blake at gunpoint to lie on the floor and then arrested and handcuffed him. See *id.* at 175-76. Mr. Blake was wearing only boxer shorts and an undershirt. See *id.* at 176-77. Giving Mr. Blake no time to put on clothes or shoes, six or seven police officers forcibly removed him from his home. See *id.* at 177.

Officer Curtis Reese drove the police car that transported Mr. Blake to the Annapolis Police Department. See JA 178. Upon arrival at the police station, the police put Mr. Blake in an intake room. See *id.* at 47. Soon afterward, Detective William Johns arrived at the police station. See *id.* at 49. Detective Johns was the lead investigator on the Griffin case. See *id.* at 14-15. Johns read Mr. Blake his *Miranda* rights and provided a waiver form that outlined each right. See *id.* at 183. Mr. Blake immediately and unequivocally invoked his right to counsel, stating, "'I want a lawyer.'" See *id.* at 51, 183-84. Mr. Blake also indicated on the waiver form that he wished to consult with counsel. See *id.* at 183-84.

In response to Mr. Blake's unequivocal invocation of his right to counsel, Detective Johns temporarily stopped the interrogation. JA 51. At around 5:25 AM, Mr. Blake was transferred from the intake room to a prison cell with a concrete floor. See *id.* at 57. Mr. Blake was left alone in the cold cell, still wearing only his underwear in the early

morning hours of a late October day. See *id.* at 356. Thirty-five minutes later, Officer Reese and Detective Johns returned to Mr. Blake's cell. See *id.* at 56. Reese accompanied Johns even though Reese had no role in the Griffin investigation. See *id.* at 53, 55. Johns was unable to offer any explanation as to why Reese came with him. See *id.* at 53, 55. Mr. Blake had not asked the police to return or indicated that he wished to resume discussions. See *id.* at 63-64, 356.

Detective Johns testified that he returned to Blake's cell to provide him a copy of the statement of charges. JA 56. Although the police had possession of Mr. Blake's charging papers before he was arrested at his home, the police had not yet provided them to Mr. Blake. *Id.* at 253. Instead, Detective Johns inexplicably waited until around 6:00 AM to show Mr. Blake the charging document. See *id.* at 56. When Detective Johns and Officer Reese entered the area of the cell, Johns approached Mr. Blake and handed him the charging papers. See *id.* at 187. Johns told Mr. Blake that they were "serious charges" and that he needed "to read [them] carefully" and "make sure he understood [them]." See *id.* at 23. Mr. Blake began reading the document, the first page of which erroneously stated in capital letters that he was facing the death penalty. See *id.* at 357. Mr. Blake did not respond to Johns's comments. See *id.* at 23. Johns then turned to leave. See *id.* at 23, 357.

While Mr. Blake was reading the statement of charges Officer Reese "yelled out," "'I bet you want to talk now, huh!'" JA 61, 187. Detective Johns claimed that he was surprised by Officer Reese's outburst, which even Johns described as having been made in a "somewhat confrontational" tone. See *id.* at 61. That Reese's challenge was confrontational in nature was confirmed by Detective Johns's further testimony that he had to "literally put my hands in front of me and walk[] Officer Reese back out of the cell block area." See *id.* at 23. While pushing Reese out of the holding cell, Johns said to Reese, "'No, he doesn't want to

talk to us. He already asked for a lawyer. We cannot talk to him now.'" See *id.* at 23, 67. Johns testified that he spoke very loudly to keep Reese from saying anything further and to avoid hearing anything Mr. Blake may have said in response to Reese's comments. See *id.* at 23-24. Johns knew that Reese was aware that Mr. Blake had invoked his right to counsel. See *id.* at 65. As a result, Johns testified that he was "extremely angry" with Reese's behavior and reported the incident to his supervisor, Sergeant Greg Kirchner. See *id.* at 239-40.

Detective Johns did not, however, say anything directly to Mr. Blake about Officer Reese's challenge. Johns did not remind Mr. Blake of his *Miranda* rights, inform Mr. Blake that he did not have to respond to Reese's challenge, apologize to Mr. Blake for Reese's illegal behavior, reassure Mr. Blake that his rights would be protected, or even inquire as to whether Mr. Blake had any questions about his rights in light of the violation. Nor did Johns do anything to correct the erroneous death penalty notice. In fact, it was *outside* the cellblock that Johns reminded Reese that the police could not "'reinitiate any kind of conversation with [Mr. Blake].'" JA 24.

After Detective Johns and Officer Reese left, Mr. Blake remained in his cell, where he "just shook" with fear. JA 187. Mr. Blake was alone and had been in the cold cell without clothes for an hour. See *id.* at 363. There was no one to tell Mr. Blake that he still had a right to counsel or that the putative punishment of "DEATH" was erroneously written on the statement of charges. No police officer attempted to get Mr. Blake an attorney. See *id.*

Less than half an hour later, at 6:28 AM, Detective Johns again returned to Mr. Blake's cell.[2] JA 68-69. Mr. Blake had

[2] Although there was differing testimony at the motions hearing as to whether Detective Johns had visited the holding cell again between 6:00 AM and 6:28 AM, JA 25, 189, the trial court accepted Detective Johns' testimony that he did not. *See id.* at 360 ("The police left the cellblock area immediately after Reese made that statement. . . . [and] until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them.").

not yet had a chance to respond to Officer Reese's challenge. See *id.* at 363. Responding to that challenge, Mr. Blake said, "I can still talk to you?" See *id.* at 359-60, 26, 192. Johns asked Mr. Blake whether he was asking to talk. See *id.* at 26. Mr. Blake said that he was. See *id.* Johns then took Mr. Blake to the same intake room where he was earlier that morning. See *id.* at 27. At no time did Johns advise Mr. Blake that the death penalty notice was erroneous, and at no time did Johns ask Mr. Blake why he asked to talk to him. See *id.* at 71. The interrogation resumed, and Mr. Blake eventually made the statements that were the subject of the motion to suppress. See *id.* at 32-33, 38-39.

2. Mr. Blake was indicted on charges relating to the Griffin homicide. Before trial, he moved to suppress the statements he made during his interrogation on the grounds that they were obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which holds that police interrogation must cease as soon as a suspect requests counsel, and that any statements made during custodial interrogation by a suspect who has requested counsel are inadmissible, unless the suspect reinitiated communication with police.

On May 9 and May 16, 2003, the Circuit Court of Anne Arundel County held a hearing on Mr. Blake's motion to suppress his statements. Mr. Blake's testimony and Detective Johns's testimony largely corroborated each other's account; both men testified that Mr. Blake had initially requested counsel, and both men testified that Officer Reese had yelled "'I bet you want to talk now'" after Detective Johns gave Mr. Blake the statement of charges. JA 61, 187. Mr. Blake also testified about the reasons he spoke to Detective Johns after Officer Reese's outburst. Mr. Blake explained that the primary reason he approached Johns was because of "what

Office[r] Reese said to me, 'I bet you want to talk now, huh!'" *Id.* at 192. In addition, Mr. Blake was influenced by the charge sheet that Reese had referenced; he testified that "I saw my charges and saw I was facing death." *Id.*

Officer Reese told a much different story, however. Reese claimed that he went to Mr. Blake's cell by himself (not with Detective Johns) and that while Reese was there Mr. Blake had spontaneously asked to speak with detectives. See JA 141. Reese flatly denied that he had said "I bet you want to talk now" to Mr. Blake, *id.* at 161, and denied that Johns had pushed him out of the cellblock. See *id.* at 143-44.

The trial court specifically rejected Officer Reese's account and credited that of Detective Johns and Mr. Blake. JA 361-62. The court held that Officer Reese's statement was "interrogation . . . of a coercive nature" intended specifically to elicit a response. *Id.* The court noted two reasons why Reese's question was particularly coercive. First, the exclamation "suggests [Mr. Blake] should want to talk." *Id.* at 359. Second, by asserting that "now" Mr. Blake should want to talk, Reese "clearly refer[red]" to the statement of charges and its supposed death sentence. *Id.* "In other words, look at those charges, look at that penalty, and I'll bet you will want to talk." *Id.*

The trial court went on to find that Mr. Blake's subsequent question to Detective Johns ("I can still talk to you?") was made "in direct response to Reese's previous statement."[3] JA 359-60. The court therefore implicitly accepted Mr. Blake's testimony that his question was prompted by Reese's challenge. See *id.* at 191-92. The court noted that, because the officers left immediately after Reese's remark, Mr. Blake was unable to respond to the question until Johns returned. See *id.* at 360. And the court noted in particular that there

[3] While the transcript of the trial court's ruling reads "indirect response," JA 359-60, it is apparent from the context that the court actually said "in direct response."

was no significant lapse in time between Reese's interrogation and Mr. Blake's response. See *id.* at 366. Accordingly, the court granted the motion to suppress. See *id.*

3. Rather than proceed to trial without Mr. Blake's statement, the prosecution chose to file an interlocutory appeal of the trial court's decision. On appeal, the Court of Special Appeals of Maryland reversed the trial court solely on the theory that Officer Reese's comment did not amount to interrogation under *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). JA 385-86, 388. The court found that Officer Reese did not expect Mr. Blake to respond and did not intend to elicit incriminating information. See *id.* at 388. Accordingly, the court found that the police action did not constitute unlawful interrogation.

The Court of Appeals of Maryland unanimously reversed the Court of Special Appeals and affirmed the trial court's grant of the motion to suppress. JA 419. The Court held that Officer Reese's challenge constituted the functional equivalent of interrogation following Mr. Blake's invocation of his *Miranda* rights, thereby violating Mr. Blake's right against compelled self-incrimination. See *id.* at 396. The Court held that "[w]hen the charging document was given to [Mr. Blake], containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement, which served no legitimate purpose other than to encourage petitioner to speak." *Id.* at 412-13.

Moreover, the Court of Appeals agreed with the trial court that Officer Reese improperly reinitiated contact with Mr. Blake. JA 413. Expressly tracking the analysis of *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion), the Court of Appeals recognized that the "'dictionary sense'" of initiation is not coextensive with initiation in the *Edwards* sense. JA 415; see *Bradshaw*, 462 U.S. at 1045 (distinguishing between "the ordinary dictionary sense" of initiation and "the sense in which that word was used in *Edwards*").

And under the circumstances, the Court held that Mr. Blake had not reinitiated contact in the *Edwards* sense. Because Mr. Blake's comment, "Can I still talk to you?" was "'in direct response'" to Reese's impermissible interrogation, Mr. Blake did not independently reinitiate any contact. See JA 416.

The Court of Appeals considered and rejected the prosecution's argument that Detective Johns somehow cured the *Edwards* violation by reprimanding Officer Reese. JA 417. The Court noted that the trial court had found as a matter of fact that Mr. Blake's question to Johns was "in direct response" to Reese's interrogation and that Johns's statement did not cure Reese's unlawful interrogation. *Id.* The Court held that these factual findings were not clearly erroneous, particularly because the short time gap between Reese's comment and Mr. Blake's question indicated that Mr. Blake's statement was a continuation of the prior interrogation. *Id.* at 416-17. The Court, therefore, held that the trial court properly granted Mr. Blake's motion to suppress. See *id.* at 417-18.

Contrary to the assertion of the United States as *amicus*, the Court of Appeals did *not* hold that the police are incapable of curing *Edwards* violations absent a break in custody or a substantial lapse of time. See Br. of United States at 6-8. The United States's characterization of the Court of Appeals' decision is exclusively based on the Court of Appeals' description of *another court's decision*, specifically the Eleventh Circuit's decision in *United States* v. *Gomez*, 927 F.2d 1530 (11th Cir. 1991). See Br. for United States at 6-7; JA 418. The Court of Appeals never stated that it was adopting or relying on *Gomez*'s analysis, and certainly never held that *Edwards* violations could not be cured until a substantial amount of time had elapsed. Rather, the Court of Appeals' holding was a straightforward determination that – in this particular case – the trial court's ruling that Detective Johns's statements did not cure Officer Reese's illegal interrogation was not clearly erroneous. See *id.* at 417. The

Court of Appeals found the short break in time to be significant not because it was creating a "per se rule" as the United States claims, see Br. of United States at 8, but because the short break in time was a further indication that Mr. Blake's supposed initiation "was a continuation" of Reese's illegal interrogation. JA 417.

SUMMARY OF ARGUMENT

At bottom, this is a very simple case. It requires only a straightforward application of the rule of *Edwards* v. *Arizona* to a statement made by a suspect "in direct response" to illegal police interrogation. Petitioner attempts to obscure this fact by proposing to replace the *Edwards* rule with a freewheeling inquiry into the subjective coerciveness of concededly illegal interrogation, by blatantly mischaracterizing the opinion of the Maryland Court of Appeals, and by flatly ignoring the factual findings of the trial court. Petitioner's arguments are not well-founded and should be rejected.

The bright-line rule of *Edwards* provides critical protection of the right to counsel by requiring police to cease all custodial interrogations as soon as a suspect invokes his right to counsel and by proscribing any resumption of interrogation unless the suspect himself initiates a new encounter with officers. At the same time, the *Edwards* rule serves law enforcement interests by clearly delineating guidelines for police to conduct appropriate custodial interrogations. Although Petitioner pays lip service to the *Edwards* rule, it in fact proposes a significant revision to it. Instead of a bright-line rule excluding all statements made in response to post-invocation interrogation, Petitioner suggests that courts should weigh the coercive effect of particular *Edwards* violations to determine whether or not they constitute "badgering." Petitioner's approach would undermine the purpose and effectiveness of the *Edwards* rule, and it should be rejected.

Petitioner's suggestion that "curative measures" were not adequately considered in this case is simply wrong. The Maryland trial court considered Detective Johns's statement to Officer Reese and considered Petitioner's claim that it negated the effect of Officer Reese's challenge to Mr. Blake. But after hearing the testimony of the eyewitnesses and participants, the trial court found that Mr. Blake's statement to Johns was a response to Reese's challenge – just as Mr. Blake had testified.

The trial court's conclusion as to this historical fact should be reviewed on a clear error standard. But under any standard, the factual finding that Mr. Blake was responding to Officer Reese's challenge is well supported by the record and should be accepted. This factual finding moots Petitioner's speculative and subjective claims about the "curative effect" of Detective Johns's remonstrations to Officer Reese following Reese's illegal interrogation. By finding that Mr. Blake was responding to that illegal interrogation (as opposed to independently initiating a new conversation), the trial court necessarily found that Johns did not cure the effects of the illegal interrogation.

Even without these factual findings, Detective Johns's statement was far from adequate to cure the grave prejudice from Officer Reese's challenge. Any "curative measure" for an *Edwards* violation must be potent enough to counter the coercion from such a violation and restore the suspect to a position from which he can exercise a free choice to reopen dialogue. Here, the violation was particularly coercive, and the proffered cure was particularly weak. Reese directly challenged Mr. Blake's decision to ask for counsel and suggested that, because Mr. Blake was supposedly facing the death penalty, he ought to be talking to police. Detective Johns's reprimand of Reese did nothing to cure this challenge to Mr. Blake's decision to ask for counsel; indeed, by reemphasizing that it was Mr. Blake's choice to cut off questioning, Johns only added to the coercive effect.

ARGUMENT

I. THE *EDWARDS* RULE PROTECTS CRITICAL FIFTH AMENDMENT VALUES.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court recognized that custodial police interrogations are so inherently coercive that procedural safeguards are necessary to ensure that an individual's Fifth Amendment right against self-incrimination is protected. One such safeguard provides that if the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444-45 (emphasis added). Interrogation "*must* cease until an attorney is present," at which time "the individual *must* have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474 (emphasis added).

This guarantee was refined further in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), where this Court held that all police interrogation must cease once an accused has invoked his right to counsel "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85. This Court has emphasized repeatedly that the "strict rule"[4] set forth in *Edwards* must be enforced because "the authorities through 'badger[ing]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (alteration in original). As the Court explained in *Arizona* v. *Roberson*, "to a suspect who ha[d] indicated his inability to cope with the pressures of custodial

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[4] *James* v. *Arizona*, 469 U.S. 990, 993 (1984) (Brennan, J., dissenting from denial of petition for writ of certiorari).

interrogation by requesting counsel, any further interrogation without counsel having been provided w[ould] surely exacerbate whatever compulsion to speak the suspect may be feeling," 486 U.S. 675, 686 (1988). Thus, the purpose of the *Edwards* rule is to ensure that "any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990).

But while one purpose of the *Edwards* rule is to preserve the integrity of a suspect's request for counsel, *Edwards* has a second and equally important purpose – to provide a "'clear and unequivocal'" guide to courts and law enforcement that avoids subjective inquiries into the coercive effect of particular instances of badgering or overreaching. *Minnick*, 498 U.S. at 154; see *Roberson*, 486 U.S. at 681-83. By specifically informing officers as to what they may do during custodial interrogation, "*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151. *Edwards* is a bright-line rule that is ill-suited to the smudging and uncertainty of broad exceptions. See *Roberson*, 486 U.S. at 681 ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* . . . .")

The *Edwards* court defined a narrow and sensible exception to the rule it created that is in keeping with the purposes of *Edwards*. After an individual has asserted his right to counsel, any subsequent statements will be inadmissible unless the individual "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith*, 469 U.S. at 95. The first prong of this standard – whether the accused initiated a new conversation with the police – is a simple factual question of whether "the accused, not the police, reopened the dialogue with the authorities." *Edwards*, 451 U.S. at 486 n.9.

If the accused did not reinitiate dialogue, then all post-invocation statements are inadmissible regardless of whether such statements were the product of actual coercion. *Id.* at 484-85. If the accused did reinitiate dialogue (and was not simply responding to post-invocation interrogation), then the Court applies the traditional waiver analysis of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), to determine whether the individual's waiver of his right to counsel was genuine or the product of actual coercion by the police. See *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045 (1983) ("The inquiries are separate, and clarity of application is not gained by melding them together.").

Petitioner suggests that this clear and unequivocal rule should be replaced with a nebulous inquiry into "whether the police badgered the defendant and failed to honor the defendant's invocation of the right to counsel." Pet. Br. at 30. This suggestion is deeply flawed. The purpose of the *Edwards* rule is to avoid a detailed weighing of whether particular instances of "police badgering" (and, for that matter, purportedly ameliorative police statements) affected the voluntariness of waivers. Instead, the Court set a bright-line rule that any statements made in response to post-invocation interrogation should be suppressed. Petitioner would turn this premise on its head by having this Court look first at the actual coercive effect of the illicit interrogation to determine whether the accused "responded" to the interrogation at all. See *United States* v. *Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991) ("*Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation"). This "wag the dog" approach is flatly contrary to the constitutional and policy concerns that led to the *Edwards*

rule in the first place, and it must be rejected if the *Edwards* rule is going to continue to provide constitutional clarity.[5]

Instead, this Court should reaffirm the settled rule of *Edwards* that has guided courts and law enforcement for nearly a quarter-century: after an accused makes the significant constitutional decision to invoke his right to counsel, a custodial interrogation must cease, and all subsequent statements must be suppressed unless they are the product of the suspect's independent initiation of dialogue and are also voluntary.

Indeed, the *Edwards* rule sets forth a clear framework for courts to consider so-called "curative measures." What Petitioner calls "curative measures" – a gap in time, a break in custody, a promise by officers to respect an invocation of counsel – are not facts that automatically render post-invocation statements admissible. Rather, they are facts that may be relevant to a court's determination of the underlying factual issue of whether a defendant initiated communication. Regardless of whether police did or did not take a "curative measure" after an *Edwards* violation, the fundamental factual question is the same: was the suspect responding to police interrogation, or was he independently initiating a new encounter?

Under the facts of this case – where Mr. Blake's statement to police was in "direct response" to illegal police

[5] Petitioner also seems to conflate the rule of *Michigan* v. *Mosley*, 423 U.S. 96, 104 (1975), that assertions of the right to remain silent should be "honored" by police with the rule of *Edwards* that assertions of the right to counsel should terminate all interrogation. *See* Pet. Br. 10, 30. But this Court has recognized that an assertion of the right to counsel is fundamentally different from an assertion of the right to remain silent; by requesting counsel, a suspect states that "he is unable to proceed without a lawyer's advice." *Roberson*, 486 U.S. at 683; *see Mosley*, 423 U.S. at 110 n.2 (White, J., concurring). Police must therefore do more than "honor" the immediate request for counsel; they must cease all interrogation entirely.

interrogation – the answer to this question is clear. Because Mr. Blake responded to Officer Reese's interrogation, his statement was not an initiation by Mr. Blake, and the motion to suppress was rightly granted.

II. THE TRIAL COURT'S FACTUAL FINDINGS DEFINITIVELY ESTABLISH THAT MR. BLAKE DID NOT REINITIATE INTERROGATION.

Petitioner's entire argument is based on the fundamentally flawed premise that Maryland courts did not "consider[] . . . curative measures by the police." Pet. Br. at i. Far from ignoring Detective Johns's supposedly curative statement, Maryland courts considered that statement and came to the eminently reasonable factual conclusion that notwithstanding Johns's statement, Mr. Blake's statement was a response to Officer Reese's unlawful interrogation and the improper charging document to which it referred. Petitioner may not agree with the trial court's firsthand assessment of this episode and its impact on Mr. Blake, but that does not entitle it to relitigate this factual finding now.

The trial court's factual findings make Petitioner's argument about "curative measures" moot. Crediting the accounts of Detective Johns and Mr. Blake, the trial court concluded that Officer Reese yelled "I bet you want to talk now, huh!" at Blake and that this challenge constituted "interrogation" for purposes of *Miranda* (a point the Petitioner now finally concedes).[6] JA 357-62; Pet. Br. at 11 n.4. The trial court further found that Johns's statement did not vitiate the impact of this statement. JA 362. On the contrary, it found that Mr. Blake's later statement was made "in direct response" to Reese's question. *Id.* at 359-60.

[6] Petitioner's primary argument before both the trial court and the Maryland appellate courts was that Officer Reese's challenge was not "interrogation."

The Court of Appeals appropriately deferred to these factual findings and noted that they should not be reversed except for "clear error."[7] JA 407; see also *Bradshaw*, 462 U.S. at 1045 (declining "to build a superstructure of legal refinements around the word 'initiate' in this context"); *United States* v. *Michaud*, 268 F.3d 728, 737 (9th Cir. 2001) (whether accused initiated new conversation with police "is a factual question"); *Gomez*, 927 F.2d at 1539 n.9 (same) (citing *Fike* v. *James*, 833 F.2d 1503 (11th Cir. 1987)).[8]

Petitioner has not challenged the Maryland Court of Appeals' apparent use of the clear error standard for reviewing the trial court's factual findings, and any such challenge has therefore been waived. Regardless, the Maryland trial court's determinations that Mr. Blake's statement was a response to Officer Reese's comment is a factual finding entitled to clear error review. "Initiation" is not a legal term of art like "custody" or "probable cause." It is a simple matter of historical fact: Was the discussion begun by the suspect, or was it begun by police? This is a pure question of fact that is best resolved by a trial judge who can see the witnesses and directly assess their credibility. While an appellate court can provide guidance on a mixed question of law and fact, such as whether there is an

[7] Although the Court of Appeals noted that it was not opining definitively on the appropriate standard of review for a question of "initiation," JA 416, it reviewed key factual findings for clear error. *See id.* at 417 ("Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous.").

[8] The Circuit Courts have disagreed about this issue, as the Sixth and the Eighth Circuits have held that the issue of whether an individual "initiates" a new conversation with the police is a question of law. *Holman* v. *Kemna*, 212 F.3d 413, 417 (8th Cir. 2000); *United States* v. *Whaley*, 13 F.3d 963, 968 (6th Cir. 1994). The Seventh Circuit Court of Appeals has sided with the Ninth and Eleventh Circuits on this point in at least one unpublished opinion. *See Palaggi* v. *Chrans*, 221 F.3d 1339 (7th Cir. 2000) (unpublished opinion), *available at* 2000 WL 1055789, at **3.

interrogation, it is poorly positioned to determine the fact-specific question of whether the suspect or the police initiated communication. This is particularly so when, like here, the trial court heard live testimony from each of the individuals present about the facts attendant to the individual's custody and the impetus for the suspect's comments.

The trial court weighed Mr. Blake's credibility and his statement that the primary reason he spoke to Detective Johns was because of the challenge by Officer Reese. JA 192. Petitioner presented no evidence to rebut this testimony, and its own witness, Detective Johns, corroborated both the challenge by Reese and the circumstances surrounding that challenge (including the misinformation regarding the death penalty, Mr. Blake's dress, and the manner in which he was held). The trial court accepted these accounts, finding that Mr. Blake's statement was "in direct response" to Reese's comment. *Id.* at 359-60. This finding was eminently reasonable – as the court noted, the police left immediately after Reese's challenge and Blake had no earlier opportunity to respond. Moreover, on its face Mr. Blake's comment is in fact a response to Reese. "I bet you want to talk now, huh!" was answered with "I can still talk to you guys?"; a declaration that Mr. Blake should want to talk to the police was answered with a request to talk to the police.

In an apparent attempt to duck this factual finding, Petitioner makes the curious argument that the trial court's finding should be rejected as an inappropriate "fruits" analysis. Pet. Br. at 29. Indeed, Petitioner seems to argue that this Court's decisions make it improper to "focus on the existence of a causal connection" between illegal interrogation and a suspect's statement. *Id.* This is simply not correct. The "fruit of the poisonous tree" doctrine, which this Court has recognized does not apply to *Miranda* violations, see *Dickerson* v. *United States*, 530 U.S. 428, 441 (2000), applies when a defendant seeks to suppress *other* evidence that is derived *from* unconstitutionally obtained evidence in

addition to suppress[illegible] the originating evidence itself. For example, a defe[illegible]no identified the location of certain evidence during a [illegible]ment obtained in violation of *Miranda* could not suppress that evidence. But in this case "fruits" are not at issue. The question concerns the "tree" – *i.e.*, whether Mr. Blake's statements themselves should be suppressed and not any evidence derived from his statement, such as, for example, a murder weapon.[9] Petitioner's reliance on the "fruit of the poisonous tree" doctrine therefore misses the mark entirely.

This Court has made clear that prior interrogations are relevant to "*psychological* judgment[s]" about a suspect's motivation. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2617 (2004) (O'Connor, J., dissenting) (recognizing that a court could consider the facts and circumstances preceding a statement to determine whether the suspect had been effectively informed of her right to remain silent). Similarly, in this case the impetus for Mr. Blake's statement is the heart of an *Edwards* inquiry – whether this statement was an independent initiation or a response to Officer Reese's illegal interrogation. Indeed, it is difficult to imagine how a court could answer this question without considering whether or not Mr. Blake's statement was a "direct response" to Officer Reese's comment. Whether there was a causal connection between Officer Reese's comments, the improper charging document and Mr. Blake's statement is highly relevant.

Joining Petitioner's efforts to rewrite the Maryland courts' decisions, the United States claims that the Court of Appeals established a "per se" rule that an *Edwards* violation can be cured by nothing short of a substantial lapse of time or by a break in custody. Br. of United States at 8. The Court of Appeals held nothing of the kind. The Court of Appeals did not hold that Detective Johns's statement *could not* cure

[9] This example was provided only for the purpose of illustration. In this matter, no physical evidence was derived from Mr. Blake's statement.

Officer Reese's violation; rather, it held that the trial court did not clearly err by concluding that Johns *did not* cure the violation. JA 417. Plainly, by giving consideration to whether there had been *any* cure, see *id.*, the Court of Appeals did not hold, implicitly or otherwise, that no cure had been offered because it was not one of the permissible cures. The United States's strained interpretation is solely based upon dicta from the Court of Appeals' opinion describing the opinion of a different court. JA 417. The United States has tortured this language into a *per se* ruling that is neither explicit nor implicit in the Court of Appeals opinion.

Because the state has conceded that Officer Reese's comment constituted an unlawful interrogation, and because the trial court found as a matter of fact that Mr. Blake's comment was a response to that interrogation, the application of *Edwards* is straightforward – Mr. Blake's statements were a response to illegal interrogation and must be suppressed. No superseding events of any nature occurred that were sufficient to warrant a conclusion that Mr. Blake's statement was a new and different discussion, rather than a response to an unlawful and coercive challenge. Accordingly, Petitioner's theoretical arguments about whether an *Edwards* violation could be cured such that a suspect could independently initiate discussion are beside the point.

On the factual record in this case, the trial court made a well-supported factual finding that Mr. Blake's statements were a response to Reese's unlawful interrogation. If Mr. Blake was responding to illegal interrogation, then Officer Johns's statement necessarily did not "cure" such interrogation. As a matter of fact, therefore, the *Edwards* violation was not cured and Mr. Blake's statements were properly suppressed.

III. EVEN CONSIDERED *DE NOVO*, DETECTIVE JOHNS'S STATEMENT CLEARLY DID NOT "CURE" THE *EDWARDS* VIOLATION.

Putting to one side questions of deference to the trial court's factual findings regarding the responsive nature of Mr. Blake's statement, this remains a simple case. Mr. Blake requested counsel and was subsequently interrogated in violation of *Edwards*. Although the question of whether Mr. Blake was illegally interrogated is not before this Court (because Petitioner has conceded the point), he clearly was. Officer Reese's comment was a direct challenge to Mr. Blake's decision to ask for counsel that implied that, in light of the charges he was facing and the possibility of the death penalty, Mr. Blake should want to talk to police in order to avoid a potential capital charge. This comment was "reasonably likely to elicit an incriminating response," and was interrogation. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Detective Johns's subsequent comments to Officer Reese did not cure the effect of Reese's illegal interrogation, because those comments were insufficient under any reasonable analysis to ensure that Mr. Blake voluntarily and independently reinitiated a discussion.

A. Effective Curative Measures Must Ensure That A Suspect's Decision To Reinitiate Was Independent Of The Unlawful Interrogation.

The adequacy of any cure of an *Edwards* violation must be measured by the purpose of *Edwards* itself – to preserve a suspect's choice to rely on counsel. *Edwards* was predicated on a recognition that a suspect's request for counsel was "a significant event" that should trigger an immediate end to interrogation without counsel. *Edwards*, 451 U.S. at 485. Once a suspect requests counsel, all interrogation must cease unless "the accused, not the police, reopen[s] the dialogue." *Id.* at 486 n.9. *Edwards* "[p]reserve[s] the integrity of an accused's choice to communicate with police only through counsel" by cutting off all interrogation that is not

independently initiated by the accused. *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988).

Once police have violated *Edwards* by interrogating a suspect who has invoked his Fifth Amendment right to counsel, a strong presumption arises that any subsequent statement by the suspect is the product of coercion. See *Roberson*, 486 U.S. at 681 (stating that any waiver that comes at the authorities' behest after a suspect has invoked his right to counsel "is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect"); see also *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring) (explaining that "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism"). Any "cure" must be potent enough to overcome the presumption of coercion attendant to any *Edwards* violation.

"Curing" *Edwards* violations is therefore a matter of ensuring that a suspect has been restored to a position in which he can exercise a free choice to reopen dialogue. The only curative measures that will be effective to restore that free choice are measures that both remove the coercive effect of the unlawful interrogation and demonstrate that the suspect has decided to reinitiate communication in a new encounter that is independent of any unlawful interrogation.

The most obvious and effective curative measure is to grant the suspect's request for counsel. See *Miranda*, 384 U.S. at 466 (recognizing that a request for counsel will be an "adequate protective device"). By requesting counsel, a suspect expresses a belief that he cannot deal with police interrogation on his own and that he wants a lawyer's assistance. See *Roberson*, 486 U.S. at 683; *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring) Full respect for the integrity of a suspect's choice to communicate through counsel requires police to grant that choice.

A curative measure may also be effective if it clearly demonstrates that the suspect's claimed reinitiation is a separate encounter from the previous unlawful interrogation. Measures like a break in custody will be effective in many circumstances to cure the effect of unlawful interrogation. See *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991).[10] A "substantial break in time and circumstances" could also dissipate the effect of illegal interrogation. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).[11] It is further conceivable that persistent attempts by a suspect to reinitiate dialogue over time, and with different officers or officials, might also demonstrate a voluntary and independent waiver of a prior invocation. In short, any circumstance establishing that a suspect's statement happened during "a markedly different experience" from the illegal interrogation, can be a curative measure, making it more likely that the suspect's statement was an independent reinitiation. *Id.* at 2612 (plurality decision).

Here, none of these curative measures were present. Mr. Blake was certainly not provided with counsel after Officer Reese's interrogation and he was certainly not released from custody. Moreover, there was no break in time and circumstances. At approximately 6:00 AM Mr. Blake was

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[10] *See also McFadden* v. *Garraghty*, 820 F.2d 654, 660-61 (4th Cir. 1987); *United States* v. *Barlow*, 41 F.3d 935, 945-46 (5th Cir. 1994); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125 (7th Cir. 1987), *overruled on other grounds by United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982); *United States* v. *Geittmann*, 733 F.2d 1419, 1425 (10th Cir. 1984); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988).

[11] *See United States* v. *Harris*, 221 F.3d 1048, 1053 (8th Cir. 2000) (holding three hour break in time sufficient to defeat *Edwards* protection); *Holman*, 212 F.3d at 419 (finding that confession given the day after an *Edwards* violation reduced likelihood that suspect was "under any compulsion to confess"); *Hill* v. *Brigano*, 199 F.3d 833, 842 (6th Cir. 1999) (concluding that confession given day after impermissible interrogation constituted a sufficient lapse in time).

illegally interrogated by Officer Reese in Detective Johns's presence. After Reese's challenge to Mr. Blake, Johns immediately pushed Reese out of the cell before Mr. Blake could respond. For the next half hour Mr. Blake remained alone and cold in the same cell, still laboring under the erroneous belief that he was facing the death penalty. Upon Johns's return, Mr. Blake asked if they could talk. The trial court and the Court of Appeals were clearly correct in concluding that the short gap in time did not remove the effect of Reese's interrogation. This is particularly so because Mr. Blake spoke to Johns *at the very next opportunity*, and because Mr. Blake's statement was directly responsive to Reese's statement.

B. Detective Johns's Statement Is Not An Effective Curative Measure.

Recognizing that Mr. Blake's supposed reinitiation presents few indicia of a new encounter, Petitioner proposes that police should be able to "cure" *Edwards* violations verbally, by merely stating an intention to engage in no further questioning. This suggestion is flawed for several reasons. In the first place, Petitioner's argument that police can talk their way out of an *Edwards* violation is inconsistent with this Court's recognition that the mere repetition of *Miranda* warnings is insufficient to remedy an *Edwards* violation. Moreover, the specific statement Detective Johns made here is not an adequate curative measure because it does nothing to cure the harm caused by Officer Reese's scoffing challenge to Mr. Blake's request for counsel. Johns's statement did not even rise to the level of a repeated *Miranda* warning, which this Court has recognized is insufficient to cure such a violation. *Roberson*, 486 U.S. at 686.

1. An *Edwards* violation cannot be cured by a mere repetition of *Miranda* rights.

Petitioner and his supporting *amici* argue that the ordinary *Edwards* rule should not apply if the police "cure" the

coercive effects of post-invocation interrogation by reassuring the accused of his Fifth Amendment rights. This argument presumes that the coercive effects of impermissible interrogation *can* be cured by the words of the police. Yet, this Court has recognized on numerous occasions that "the mere repetition of the *Miranda* warnings [do] not overcome the presumption of coercion that is created by prolonged police custody." *Roberson*, 486 U.S. at 686. That is because post-invocation interrogation, unlike ordinary custodial interrogation, does more than threaten to "subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457-58. It also violates "the integrity of an accused's choice to communicate with police only through counsel," which "is the essence of *Edwards* and its progeny." *Patterson*, 487 U.S. at 291, *quoted in Minnick*, 498 U.S. at 153.

Police cannot cure this latter violation by reassuring an accused of his rights. If anything, such promises only heighten the confusion and fear of the accused as to whether his right to an attorney will be honored or not, thereby "exacerbat[ing] whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686. In this case, the danger of that "exacerbat[ion]" became a reality for Mr. Blake. As the trial court recognized, the dramatic scene created by Officer Reese's outburst and Detective Johns's response "looked like a good cop, bad cop routine" in which the "out of control" Reese had to be "reigned in" by Johns. JA 362. Such theatrics do not "cure" the coercive effect of Reese's post-invocation interrogation.

Petitioner's reliance on *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and *Missouri* v. *Siebert*, 124 S. Ct. 2601 (2004) (plurality decision), to support its argument is misplaced. Both *Elstad* and *Siebert* involved situations where an individual gave an inculpatory statement prior to the issuance of *Miranda* warnings, then re-confessed after the warnings were issued. *Elstad*, 470 U.S. at 300-02; *Siebert*, 124 S. Ct. at 2606. On both occasions, the accused sought to suppress both

the pre-*Miranda* and post-*Miranda* statements. In *Elstad*, this Court held that the post-*Miranda* confession was admissible notwithstanding the accused's earlier, inadmissible confession so long as the first confession was not the product of "coercive or improper tactics." *Elstad*, 470 U.S. at 314.

In contrast, the interrogating officer in *Siebert* deliberately withheld the *Miranda* warnings as part of an "interrogation technique." *Siebert*, 124 S. Ct. at 2606. Although the officer administered the *Miranda* warnings before taking down a second confession from the accused, a plurality of this Court held that the post-*Miranda* statement was inadmissible as well because the interrogating officer's technique "challeng[ed] the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 2613. In a concurring opinion, Justice Kennedy noted that the post-*Miranda* confession might have been admissible had the police employed "[c]urative measures . . . to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* at 2616 (Kennedy, J., concurring). The concurrence suggested that measures like "a substantial break in time and circumstances" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement" could constitute curative measures in an appropriate situation. *Id.*

Petitioner and its *amici* seek to transplant Justice Kennedy's "curative measures" into the context of post-invocation interrogations, but the concept is a poor fit in the *Edwards* arena. First, neither *Elstad* nor *Siebert* involved direct violations of *Miranda*, but rather concerned the appropriate remedy for legally obtained statements whose procurements nevertheless tended to weaken the overall effectiveness of the *Miranda* warnings. As Justice Kennedy noted in his concurring opinion in *Siebert*, whether the Court should

widen the exclusionary rule of *Miranda* to encompass technical non-violations of the rule turns on both the legitimacy of the government's procurement and use of the statement as well as the extent to which the admission of the statement "would frustrate *Miranda*'s central concerns and objectives." *Id.* at 2614. The police could mitigate any "concerns" about the effectiveness of *Miranda* by "ensur[ing] that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* at 2616.

Interrogation of an individual after that person has invoked the right to counsel is not, however, an otherwise permissible act that arguably implicates the "concerns" of *Miranda*. It is a direct violation of *Miranda* and *Edwards*, and there is a serious question as to whether a statement by an officer after such a violation can be alone sufficient to "cure" the violation. Whether the police could cure their own violation based upon facts and circumstances different from those presented here is a question for another day. At a minimum, such efforts would, as noted above, require restoring the accused to his previous position, vitiating any taint, and conveying a direct and specific recognition that the accused's desire to rely on counsel would be respected. And such efforts would have to be particularly robust to ensure that any reasonable person "would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver" once the police have violated the very warning they have promulgated. *Siebert*, 124 S.Ct. at 2616. A promise, once broken, can rarely be repaired with yet more promises, and a suspect's confidence in a right that has been violated can rarely be restored with a subsequent assurance that the right will not be violated again.

2. Detective Johns's statement to Officer Reese did not negate the coercive effect of Reese's unlawful interrogation.

Petitioner claims that it was enough for Detective Johns to "mak[e] it clear that it was [Mr.] Blake's choice whether to talk to police, and [that] the police intended to honor that choice." Pet. Br. at 30. Even assuming that Johns's statement had those effects (which it did not), this does nothing to cure the fundamental harm of Officer Reese's statement. Petitioner attempts to minimize the impact of the illegal interrogation by claiming that Reese only made an "off-hand . . . remark," *id.*, and by implying that this case presents "an unintended *Miranda* violation." *Id.* at 22. Petitioner's claims are at odds with the plain facts and the non-erroneous factual findings made by the trial court. Petitioner's own officer described Reese's comment as a "confrontational" one – not an offhand remark. JA 61. And the fact that Reese denied ever making this statement further undercuts any suggestion of an innocent misstatement. *Id.* at 161.

In context, Officer Reese's challenge was not an offhand remark; it was a highly coercive statement intended to undermine Mr. Blake's assertion of his constitutional rights. Moreover, this direct challenge to Mr. Blake's request for counsel was made with the clear implication that Mr. Blake's refusal to speak with officers made it more likely that he would receive the death penalty. Those harmful effects were never cured by Detective Johns's statement to Reese. At no time did Johns inform Mr. Blake that he was not facing the death penalty or inquire whether Mr. Blake's statements were prompted by Reese's challenge.

The utter insufficiency of Detective Johns's "cure" is illustrated by measuring it against Officer Reese's acutely coercive statement. Reese's challenge was not an ordinary investigatory question. Reese confronted Mr. Blake and told him that he had made the wrong choice – that in light of the charges against him Mr. Blake should *want* to talk to police.

Such a violation cannot be cured by simply repeating that it was Blake's choice not to talk to police. As the trial court determined, Detective Johns's statement only heightened the coercive effect of Reese's statement by making it plain to Mr. Blake that he had made his (incorrect) choice and that he was going to suffer the consequences of a potential death penalty. JA 362. In short, Johns's recrimination to Reese only indicated that Mr. Blake could not be questioned anymore and did nothing to indicate to Mr. Blake that the substance of Reese's challenge (that Mr. Blake should want to talk to avoid the death penalty) was incorrect.

Under Petitioner's theory, police could challenge a suspect's request for counsel, tell a suspect that he should be making a different choice, and even assert that a suspect ultimately might be executed because of his non-cooperation. So long as the police follow those statements with a *pro forma* "reminder" that the suspect has the right not to talk to them, claims Petitioner, any subsequent statement by the suspect should be admissible.

Petitioner's theory therefore would map out an end-run around *Miranda*'s requirements. *Amicus curiae* the United States claims that "there is no appreciable danger" that officers would abuse a curative measures rule to circumvent *Edwards*, reasoning that a suspect's decision to reinitiate is outside the officer's control. Br. of United States at 26. This is simply gross speculation that is supported neither by theory nor by experience. In the first place, *every* decision by a suspect in custodial interrogation is outside the direct control of the police. Police using a two-step interrogation process, as was used in *Siebert*, cannot "control" whether a suspect will make the same statements after *Miranda* warnings that he made before the warnings. But with a practiced understanding of human nature and psychology, police can and will use any available method to elicit statements in the inherently coercive environment of custodial interrogation. See *Miranda*, 384 U.S. at 448-55; *Siebert*, 124 S. Ct. at 2608.

It would be Pollyannaish to assume that officers would never take advantage of a "curative measures" exception to *Edwards*, particularly one as broad as Petitioner seeks to draw. This case presents an apt example. Officer Reese directly and "confrontational[ly]" challenged Mr. Blake's choice to request counsel, JA 61, going so far as to suggest that his decision would affect whether he received the death penalty. This challenge was supposedly cured when another officer stated that Mr. Blake could not be questioned any more. But Mr. Blake was clearly told that he should have made the decision to cooperate in light of the charges and purported penalty. Whether or not this was an intentional strategy by the Maryland police,[12] it certainly presents a significant opportunity for officers to exercise intentional strategies. It would, in short, sanction the use of "good cop, bad cop" routines to challenge a suspect's invocation of the right to counsel.

The risk of abuse is especially acute because, after a suspect requests counsel, an interrogating officer has nothing to lose. Because the suspect has already asked to end the interrogation, the officer has no chance of obtaining incriminating statements unless the suspect decides to reinitiate. Police in that situation have a strong incentive to

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[12] Although the officers' subjective intent is not relevant to the objective question of whether Mr. Blake reinitiated contact, the facts suggest that their conduct may have been the result of a coordinated strategy. Detective Johns was unable to explain why he was accompanied by Officer Reese, an officer unconnected with the investigation. JA 53, 55. And although Detective Johns and Officer Reese supposedly visited Mr. Blake's cell to give him the statement of charges, the statement of charges had actually been generated at 2:46 AM, nearly two hours before Mr. Blake's arrest and nearly two and a half hours before Mr. Blake was first questioned. *See id.* at 329, 333. The statement of charges could easily have been presented to Mr. Blake before he invoked his right to counsel. Indeed, the trial court noted how much Officer Reese's and Detective Johns' actions when giving Mr. Blake the statement of charges resembled a "good-cop, bad-cop" strategy. *Id.* at 362.

goad suspects into changing their mind, and this Court can expect that police will exploit a curative measures exception to the limit of the law.[13] If Petitioner's expansive version of curative measures were accepted, then *Edwards*' protection would be eviscerated.

Moreover, Detective Johns's statement was also inadequate because it was not directed at Mr. Blake. While Johns reprimanded Officer Reese, he never addressed Mr. Blake. Conversations between officers in a suspect's presence are ordinarily not interrogation, even if the statements would have been interrogation if they had been directed at a suspect. See *Innis*, 446 U.S. at 302. Similarly, a conversation between officers in a suspect's presence is not sufficient to communicate a curing message. To hold otherwise would be to create an illogical disparity – if an officer's comment to another officer in the presence of a suspect will rarely constitute "interrogation," then such a statement between officers should rarely cure an illegal interrogation. Because curative measures can only be effective when they restore the suspect to a position where he can exercise a free choice, an effective curative measure should almost always be directed at the suspect. This is particularly so in cases like this one, where the interrogation was "confrontational" and clearly directed at the suspect. Reese's direct and forceful challenge to Mr. Blake's decision to request counsel could only be cured verbally by an equally direct and forceful statement to Mr. Blake. Because Johns's statement to Reese was far from adequate to cure the severe *Edwards* violation committed by Reese, Johns's statement was not a sufficient "curative measure."

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[13] *See generally* Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 Mich. L. Rev. 1121, 1122-25 (2001) (describing how police interrogation practices are responsive to this Court's *Miranda* decisions).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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